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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1951.

No. .....

NABOB OIL COMPANY, A CORPORATION, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

No. .....

O. O. OWENS, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRITS OF *CERTIORARI.*

To the Honorable Fred M. Vinson, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States—

MAY IT PLEASE THE COURT:

Your petitioners, Nabob Oil Company and O. O. Owens, each respectfully petitions this Honorable Court for a Writ of Certiorari requiring the United States Court of Appeals for the Tenth Circuit to certify to this Court for its review and determination the case of *Nabob Oil Company, a corporation, Appellant,* v. *United States of America, Appellee,* No. 4225, and the case of *O. O. Owens, Appellant,* v.

United States of America, Appellee, No. 4226, on the docket of the United States Court of Appeals for the Tenth Circuit.

I.

Statement of Matter Involved.

Petitioners were jointly indicted, January 18, 1950, by a Grand Jury. The indictment contained seventeen counts of alleged violations of the Fair Labor Standards Act (29 U. S. C. 201, *et seq.*) (R. 6-14).

The petitioners were charged with *wilfully* violating the Fair Labor Standards Act, under the *criminal* liability provision of the Act, 29 U. S. C. 216a, which provides:

> "Any person who wilfully violates any of the provisions of Section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection."

During the course of the trial before a jury, the Government dismissed Counts 9 and 10 (R. 144, 145). The trial resulted in a verdict of guilty as to each of petitioners (R. 15, 16) as to the remaining 15 counts. The Court adjudged that each of the petitioners pay a fine of $100.00 on each of the first Five Counts of the indictment, and a fine of $50.00 on each of Counts 6, 7 and 8 and 11 to 17, inclusive (R. 21, 23).

From these judgments, petitioners appealed to the United States Court of Appeals (R. 23, 24).

Thereafter, on July 10th, 1951, the United States Court of Appeals affirmed the judgments as to both petitioners (R. 277-278).

II.

This Court Has Jurisdiction.

1. This petition for writs of certiorari is prosecuted by each of the petitioners pursuant to the provisions of Title 28, U. S. C., Sec. 1254.

2. The opinion (R. 273) and judgments (R. 277-278) of the United States Court of Appeals were filed July 10th, 1951. Order was entered extending time to July 30, 1951, to file Petition for Rehearing on July 18th, 1951 (R. 278). Petition for Rehearing was filed July 27th, 1951 (R. 278-279). The Court entered its order denying said Petition for Rehearing the 24th day of August, 1951 (R. 279).

III.

Questions Presented.

Where the "wilful" violation of a penal criminal statute is proscribed, the word "wilful" does not mean and is not the equivalent of "intentional," "voluntary," or "designed," as is the case where a penalty created by a statute can be recovered only by a civil action and a money judgment as distinguished from a criminal prosecution which provides for a fine and jail sentence. An intentional violation in a penal criminal statute becomes "wilful" only if done with a bad or evil purpose, with a wrongful or criminal intent or motive.

IV.

Reasons Relied Upon for the Allowance of the Writs.

A Writ of Certiorari should be allowed each of petitioners because the decision of the Court of Appeals which approved the trial court's instructions to the jury defining

the meaning of a "wilful" violation of the penal criminal provision (29 U. S. C., Sec. 216a) of the Fair Labor Standards Act is in conflict with the settled law reflected by decisions of this Court on that question, in the following cases:

Screws v. *United States*, 325 U. S. 91, 89 L. ed. 1495;
United States v. *Murdock*, 290 U. S. 389, 78 L. ed. 381;
Felton v. *United States*, 96 U. S. 699, 24 L. ed. 875;
Potter v. *United States*, 155 U. S. 438, 39 L. ed. 214;
Spurr v. *United States*, 174 U. S. 728, 43 L. ed. 144.

The trial court (R. 244) instructed the jury that:

> "The word 'wilfully' connotes an intentional violation of the law and you are advised, gentlemen of the jury, that a defendant who actually does violate the provisions of the Fair Labor Standards Act would not be guilty of a criminal offense unless he is either conscious of the fact that what he is doing constitutes a violation of the Act or unless he wholly disregards the law and pursues a course without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law or not."

At R. 250, the Court omitted the word "wilfully" and instructed the jury that they might properly consider certain evidence,

> "* * * in determining whether or not Nabob Oil Company and O. O. Owens violated the Fair Labor Standards Act when they changed from the eighty-five cents an hour rate to the dollar an hour rate of pay."

These instructions in effect told the jury that an intentional violation of the Act was sufficient, and permitted the jury to decide which of the two conflicting instructions was the law to be followed.

The Court of Appeals, after quoting the first of the above quoted instructions, decided (R. 275),

> "* * * the definition correctly defines the term 'wilful' as used in statutes such as the one being considered here. In some penal statutes the word 'wilful' means that the offense must be committed malevolently, with a bad purpose or an evil mind. These offenses ordinarily involve moral turpitude but in those statutes denouncing acts not in themselves wrong, such an evil purpose or criminal intent need not exist, it is sufficient if the act was deliberate, voluntary and intentional as distinguished from one committed through inadvertence."

This Court has uniformly held that although the word "wilful" in a statute which provides only a civil remedy denotes an act which is intentional rather than accidental, that when "wilful" is used in a penal criminal statute it generally means an act done with a bad purpose; that something more is required than the doing of the act proscribed by the statute; that an evil motive to accomplish what the statute condemns becomes a constituent element of the crime; that the issue of "wilful" violation must be submitted to the jury under appropriate instruction; that the word "wilfully" added to a criminal statute makes the statute less severe by making it applicable only when the requisite bad purpose is present. *Screws* v. *United States, supra.*

Wherefore, petitioners pray that this Court issue a Writ of Certiorari in each of their respective cases to the United States Court of Appeals for the Tenth Circuit, commanding said court to certify to this Court a full and complete transcript of the record and of the proceedings in said Court of Appeals had in cases Nos. 4225 and 4226 on

its docket, to the end that said cases may be reviewed and determined by this Court, as provided by the Statutes of the United States, and that the judgments against each of petitioners of said Court of Appeals may be reversed by this Court and each of said cases remanded to the trial court for a new trial, and for such other relief as to this Court may seem proper.

Respectfully submitted,

NABOB OIL COMPANY,
By O. O. OWENS, Its President,
and
O. O. OWENS, Individually,
Petitioners.

BRIEF IN SUPPORT OF PETITION OF NABOB OIL COMPANY, A CORPORATION, AND O. O. OWENS FOR WRITS OF *CERTIORARI.*

I.

Opinions of Court Below.

No written opinion was rendered by the trial court. The Journal Entry of Judgment and Commitment of the trial court against Nabob Oil Company appears at R. 22, 23. The Journal Entry and Commitment of the trial court against O. O. Owens appears at R. 21, 22. The opinion of the Court of Appeals appears in the record beginning at p. 273.

II.

Jurisdiction of This Court.

The grounds of jurisdiction of this court are stated in paragraph II of the foregoing Petition for Writ of Certiorarai.

III.

Statement of the Case.

A sufficient statement of the case has been made in para graph I of Petiion for Writ of Ceritorari and is by reference made a part of this brief.

IV.

The errors of the United States Court of Appeals relied upon for reversal of its judgments in these cases are stated in paragraph IV of the Petition for Writ of Certiorari, and are adopted by reference as a part of this brief.

V.

Argument.

The decision of the Court of Appeals that where the "wilful" violation of a penal statute is proscribed,

> "It is sufficient if the act was deliberate, voluntary and intentional as distinguished from one commited through inadvertence." (R. 276),

overlooks the distinction between penal statutes which provide only a civil remedy to recover a judgment in a civil action for penal damages, and penal statutes which provide for a criminal prosecution and for a fine or a jail sentence.

In *United States* v. *Illinois Cent. R. Co.*, 303 U. S. 239, 82 L. ed. 773, the railroad company was sued in a civil action pursuant to Title 45, U. S. C., Sec. 74, to recover the penalty set out in Title 45, U. S. C., Sec. 73, for having violated Title 45, Secs. 71 and 72, which sections limied the time of confinement in transporting certain animals and provided for unloading, resting, watering and feeding such animals in transportation.

Section 74 provided for a civil remedy only, as follows:

> "The penalty created by Section 73 of this title shall be recovered by civil action in the name of the United States, etc."

In that case the court did in effect hold that it was sufficient if the act was deliberate, voluntary and intentional as distinguished from one committed through inadvertence. But in that case a money judgment only could be recovered in a civil action against the defendant. The defendant was not subjected to a possible fine or jail sentence as they were in the cases at bar.

In *Screws* v. *United States,* 325 U. S. 91, 101, 89 L. ed. 1495, 1502, the statute involved was a penal statute which provided for criminal prosecution (not a civil action) and carried a penal fine of $1,000 for each offense or one year imprisonment, or both. This Court in that case said:

> "We recently pointed out that 'wilful' is a word of many meanings, its construction often being influenced by its context. * * * At times, as the court held in *United States* v. *Murdock,* 290 U. S. 389, 394, 78 L. ed. 381, 384, 54 S. Ct. 223, the word connotes an act which is intentional rather than accidental. And see *United States* v. *Illinois Cent. R. Co.,* 303 U. S. 239, 82 L. ed. 773, 58 S. Ct. 533. But 'when used in a criminal statute it generally means an act done with a bad purpose.' *Id.,* 290 U. S. 394, 78 L. ed. 384, 54 S. Ct. 223, and see *Felton* v. *United States,* 96 U. S. 699, 24 L. ed. 875; *Potter* v. *United States,* 155 U. S. 438, 39 L. ed. 214, 15 S. Ct. 144; *Spurr* v. *United States,* 174 U. S. 728, 43 L. ed. 1150, 19 S. Ct. 812; *Hargrove* v. *United States,* (C. C. A. 5th) 67 F. (2d) 820, 90 A. L. R. 1276. In that event something more is required than the doing of the act proscribed by the statute. Cf. *United States* v. *Bolint,* 258 U. S. 250, 66 L. ed. 604, 42 S. Ct. 301. An evil motive to accomplish that which the statute condems becomes a constituent element of the crime. *Spurr* v. *United States, supra; United States* v. *Murdock, supra.* And that issue must be submitted to the jury under appropriate instructions. *United States* v *Rogen,* 314 U. S. 513, 86 L. ed. 383, 390, 62 S. Ct. 374."

At pages 102, 103, the Court further said:

> "In *United States* v. *Ragen, supra,* we took that course in a prosecution for wilful evasion of a federal income tax where it was alleged that the defendant had deducted more than 'reasonable' allowances for salaries. By construing the statute to require proof of bad faith we avoided the serious question which the

rule of *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, 65 L. ed. 516, 41 S. Ct. 298, 14 A. L. R. 1045, *supra*, might have presented. We think a like course is appropriate here."

* * * * * * * *

"* * * But as we have seen, the word 'wilfully' was added to make the section 'less severe.' We think the inference is permissible that its severity was to be lessened by making it applicable only where the requisite bad purpose was present, thus requiring specific intent not only where discrimination is claimed but in other situations as well. We repeat that the presence of a bad purpose or evil intent alone may not be sufficient. We do say that the requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law saves the Act from any charge of unconstitutionality on the ground of vagueness."

At pages 106, 107, the Court further said:

"The difficulty here is that this question of intent was not submitted to the jury with proper instructions. The court charged that the petitioners acted illegally if they applied more force than was necessary to make the arrest effectual or to protect themselves from the prisoner's alleged assault. But in view of our construction of the word 'wilfully' the jury should have been further instructed that it was not sufficient that petitioners had a generally bad purpose. To convict it was necessary for them to find that the petitioners had the purpose to deprive the prisoner of a constitutional right, *e. g.*, the right to be tried by a court rather than by ordeal. And in determining that requisite bad purpose was present the jury would be entitled to consider all the attendant circumstances—the malice of petitioners, the weapons used in the assault, its character and duration, the provocation, if any, and the like."

The trial court's instruction (R. 250) that the jury might consider certain evidence,

> "in determining whether or not Nabob Oil Company and O. O. Owens intentionally violated the Fair Labor Standards Act * * *,"

in effect told the jury that an "intentional" violation was the equivalent of a "wilful" violation of the Act.

The word "wilful" as defined by this Court in a penal criminal statute is not the equivalent of "intentional." *Screws* v. *United States, supra.*

In *Armour & Co.* v. *Wantock,* 323 U. S. 126, 89 L. ed. 118, 123, this Court said:

> "* * * It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by circumstances of cases not before the court. General expressions transposed to other facts are often misleading. * * *"

Screws v. *United States, supra,* was based on a penal statute, which provided for criminal prosecution and carried a criminal penalty of a fine or imprisonment, or both. When this Court said that at times the word "wilful" denotes an act which is intentional rather than accidental and cited *United States* v. *Illinois C. R. Co.* as an example of that rule, which case provided only for a civil action and not a criminal prosecution, and then continued by saying,

> "But, when used in a criminal statute, it generally means an act done with a bad purpose. * * *",

the words of this Court must be read in light of the facts of the cases under discussion, which can only mean that

this Court recognizes the well recognized distinction between the meaning of a "wilful" violation in a civil action and a "wilful" violation in a criminal prosecution.

That in a criminal statute a "wilful" violation means with a bad purpose, an evil intent, or malice or a criminal intent is well settled. See: *Shields* v. *State,* 184 Okl. 618, 89 P. (2d) 756, 760; *People* v. *Harrison,* 238 N. Y. 348, 144 N. E. 636, 637; *State* v. *Clifton,* 152 N. Car. 800, 67 S. E. 751, 752; *Roby* v. *Newton,* 121 Ga. 679, 49 S. E. 694, 696, citing *Hatley* v. *State,* 118 Ga. 81, 44 S. E. 852; *Rhoads* v. *First Natl. Bank,* 37 N. Dak. 421, 163 N. W. 1046, 1050; *State* v. *Grossle,* 74 Mo. App. 313, 316; *State* v. *High,* 26 Tex. App. 545, 10 S. W. 238; *Williams* v. *People,* 26 Colo. 272, 57 Pac. 701, 702; *State* v. *Vinzant,* 200 La. 301, 7 So. (2d) 917, 922; *Sohn* v. *Sohn,* 212 Minn. 316, 3 N. W. (2d) 496, 497; *Thornton* v. *State,* 63 Ga. App. 255, 10 S. E. (2d) 714, 715.

Under the rule stated in *Screws* v. *United States, supra,* a proper instruction should have been given in the instant case defining a "wilful" violation to mean, not only that the violation was with a bad purpose, but also that such violation must have been done with the specific intent to deprive the employees of the benefits of the Act.

The evidence in the record is conclusive that neither of the petitioners, Nabob Oil Company or O. O. Owens, president and managing officer of Nabob Oil Company, had a bad purpose or a specific wrongful intent to violate the Fair Labor Standards Act. The only motive petitioners could have had for depriving the employees of overtime pay would have been for petitioners' profit, to save money, at the expense of the employees. The record shows petitioners

were very liberal and generous with the employees and never sought to profit at the expense of the employees.

Although not obligated to do so under the Fair Labor Standards Act, petitioners furnished the employees modern houses to live in (R. 159); paid the employees travel time in going to and from work for the different employers (R. 158-160); furnished them free meals on the job (R. 161, 162); paid them straight time while off duty by reason of injuries or sickness of the employee, or sickness in the family (R. 172); and without obligation to do so, paid most of the employees a bonus at the end of the year, which averaged about 12½ per cent of the employee's total gross pay for the year (R. 90, 110).

But more convincing than all this is the fact that early in 1948, an agent of the Wage and Hour Division made a complete investigation of the books and records of Nabob Oil Company (R. 141, 142). Nabob Oil Company and its president O. O. Owens cooperated with that agent in his investigation; furnished him a car and a driver so that he might interview all of the employees (R. 143, 144).

Never was it pointed out by the agents of the Wage and Hour Division wherein Nabob Oil Company or O. O. Owens, president of Nabob Oil Company, had violated the Act. From early in 1948 until January 18, 1950, when the joint indictment was returned against the petitioners, there was complete silence. The administrator brought no action to enjoin any custom or practice of petitioners.

The foregoing circumstances and conditions demonstrate that the necessary element of bad purpose and evil motives to wilfully violate the Act is completely lacking in the instant cases. But even though there were evidence tending to show bad purpose or evil motive to violate the

Act, petitioners were entitled to have the jury determine that question upon proper instructions given.

Finally, the Court of Appeals in its opinion (R. 276-277) states that defendants' objection to the instruction defining a "wilful" violation of the Act did not set forth the specific ground for the objection and hence did not meet the requirements of Rule 30, Federal Rules of Criminal Procedure. That obpection has been fully disposed of by *Screws* v. *United States, supra,* wherein this Court at page 107 of 325 U. S., said:

> "It is true that no exception was taken to the trial court's charge. Normally we would not under those circumstances take note of the error. See *Johnson* v. *United States,* 318 U. S. 189, 200, 87 L. ed. 704, 713, 63 S. Ct. 549. But there are exceptions to that rule. *United States* v. *Atkinson,* 297 U. S. 157, 160, 80 L. ed. 555, 557, 56 S. Ct. 391; *Clyatt* v. *United States,* 197 U. S. 207, 222, 49 L. ed. 726, 731, 25 S. Ct. 429. And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which conviction could rest, we think it necessary to take note of it on our own motion. Even those guilty of heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a federal crime are entitled to be tried by the standards of guilt which Congress has prescribed."

Furthermore, in the brief in support of Petition for Rehearing, page 8, the Appellate Court's attention was called to the fact,

> "that on oral argument Government counsel admitted that the specific grounds of the objection were presented to the trial court by a memorandum brief * * *."

Petitioners respectfully submit that the Writ of Certi-

orari applied for by each of them, respectively, should be granted by this Court and that upon a review of the decision and judgments of the Court of Appeals, these cases should be reversed and remanded to the trial court for a new trial.

Respectfully submitted,

NABOB OIL COMPANY,
By O. O. OWENS, Its President,
and
O. O. OWENS, Individually,
Petitioners.